COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP46-CR **Cir. Ct. No. 2007CF1225**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMOTHY A. JENKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CARL ASHLEY and REBECCA F. DALLET, Judges.[1] *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

[1] The Honorable Carl Ashley entered the judgment of conviction and imposed sentence. The Honorable Rebecca F. Dallet entered the order denying Jenkins' postconviction motion.

¶1 PER CURIAM. Jimothy A. Jenkins appeals from a judgment of conviction, entered upon a jury's verdict, of one count of first-degree intentional homicide, as party to a crime, with use of a dangerous weapon; one count of first-degree reckless injury, party to a crime, with use of a dangerous weapon; and one count of possession of a firearm by a felon. Jenkins additionally appeals an order denying his postconviction motion for a new trial. Jenkins had alleged that trial counsel was ineffective for not sufficiently investigating Cera Jones and calling her as a witness, and for not subpoenaing Corey Moore and Christopher Blunt after Blunt allegedly confessed to Jenkins' crimes within earshot of Moore. Jenkins further sought a new trial in the interests of justice because of trial counsel's ineffectiveness. After an evidentiary hearing, the circuit court denied the postconviction motion. We affirm.

BACKGROUND

¶2 According to the criminal complaint, on March 23, 2007, Anthony Weaver and Toy Kimber's car ran out of gas near 2100 N. 38th Street, about seven blocks from Kimber's home on 45th Street. The two men got out of the car and started talking to two girls, one of whom was Cera Jones. Kimber admitted purchasing ten dollars' worth of marijuana from one of the girls. While Weaver and Kimber were talking with the girls, a car drove past them, executed a U-turn, and came back to where the quartet was standing. A man stepped out from the car's back seat, pointed a gun, and fired four or five shots. Weaver was killed; Kimber was shot in the leg.

¶3 Kimber initially told police he did not know the shooter, though he subsequently identified Jenkins from a photo array. Kimber apparently knew Jenkins for at least three years and, earlier in the evening, may have been at a

home leased by Jenkins and two others. According to police reports, Jones told police that she could not see the shooter because it was dark and the shooter was wearing a hoodie.

¶4 According to Jenkins' postconviction motion, Jones was reinterviewed on April 1, 2007. She told police that she had not seen the shooter before and further described him as having a medium complexion and a clean-shaven, baby face. On April 3, 2007, Jones was interviewed again and shown a lineup of suspects. She told police that the shooter was not in the lineup. Also according to the motion, Jones told police that Jenkins was definitely not the shooter. However, the police reports do not reflect that statement or another statement that Jones claimed to have made stating that she saw Jenkins on a porch across the street from the shooting just minutes after it happened.

¶5 After Jenkins was arrested, he was housed in the same jail "pod" as Corey Moore and Christopher Blunt. Blunt allegedly confessed to Jenkins that he shot Weaver and Kimber, purportedly because they had beaten Blunt's brother. Jenkins told his attorney about this and informed him that Moore had been within earshot. Trial counsel wrote to the district attorney, asking for an investigation. Moore's attorney prevented him from speaking to the district attorney or police.

¶6 At trial, the case ultimately came down to a credibility determination between Kimber and Jenkins. Kimber testified at trial that he had immediately identified Jenkins as his shooter. Jenkins testified he was in a house at the time of the shooting. Jenkins also presented the testimony of Daniel McFadden, a co-lessor of the house, who claimed Jenkins was asleep in the home at the time of the shooting. When McFadden heard shots, he woke Jenkins and the two men went outside. At trial, though, McFadden admitted that he had also told police at

some point that Jenkins was not in the home at the time of the shooting. Ultimately, the jury convicted Jenkins as charged.

¶7 Postconviction counsel hired an investigator to talk to Jones, Blunt, and Moore. Jenkins then moved for a new trial based on ineffective assistance of trial counsel and the interests of justice. The circuit court granted an evidentiary hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶8 At the hearing, trial counsel testified that his strategy was to attack Kimber's identification of the shooter and to present McFadden as the alibi witness. Counsel could not recall if he had talked to Jones, though he believed he had reviewed her statements and discussed her identification with her. Jones testified that she had told police that she had seen the shooter's face before he pulled up his hoodie, and that he had a clean-shaven baby face with "no acne." Jenkins, on the other hand, has some acne scarring. Jones also testified that she had spoken to defense counsel twice by phone and twice in person.

¶9 When Blunt talked to the investigator, he denied knowledge of the shooting and denied knowing Jenkins. Thus, at the ***Machner*** hearing, the parties stipulated that if he had testified, Blunt would have testified consistent with his statement to the investigator. The parties also agreed that the jail records showed Jenkins, Blunt, and Moore had been housed together.

¶10 The circuit court denied the postconviction motion. It concluded that there was no prejudice from the failure to call Jones because her testimony was too inconsistent to create a reasonable probability of a different result. The circuit court also concluded there was no deficiency for failing to call Blunt or Moore: Blunt would have denied his involvement, and Moore would have not

been available to give his inadmissible hearsay testimony. Because there was no ineffective assistance, the circuit court also denied the motion for a new trial in the interests of justice. Jenkins appeals. Additional facts will be discussed below as necessary.

DISCUSSION

I. Ineffective Assistance of Counsel

A. Standard of Review

¶11 The test for ineffective assistance of counsel is two pronged. A defendant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must establish that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed … by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). On review, however, we are "highly deferential" to counsel's performance and we take care to avoid the "distorting effects of hindsight." ***Id.*** at 688-89. There is a strong presumption that counsel acted reasonably and within professional norms. ***Swinson***, 261 Wis. 2d 633, ¶58. To show prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶12 Claims of ineffective assistance of counsel present mixed questions of fact and law. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. We uphold the circuit court's factual findings, including findings on the

circumstances of the case and of counsel's strategy, unless clearly erroneous. ***Id.*** Whether the facts actually demonstrate ineffectiveness is a question of law we review *de novo*. *See* ***id.***, ¶¶21, 23. Because the defendant must show both of the ***Strickland*** prongs, we need not address them both if defendant fails to make a sufficient showing on one of them. *See* ***Swinson***, 261 Wis. 2d 633, ¶58.

B. Cera Jones

¶13 Jenkins claims that trial counsel was ineffective for failing to investigate Jones or call her to testify on his behalf.[2] Jenkins believes that her testimony was important because she did not identify Jenkins as the shooter, gave a description that did not match him, partially corroborated his alibi about being in a house at the time of the shooting, and was a "neutral" witness. The circuit court rejected the ineffectiveness claim with regard to Jones because, though it had a difficult time determining trial counsel's strategy, it concluded there was no prejudice from the failure to call her: Jones's version of events had changed so many times, she was not really a credible witness.

¶14 The circuit court had a difficult time determining whether trial counsel was deficient with regard to any sort of strategy, because counsel had a difficult time remembering exactly what transpired with regard to Jones. His notes had been destroyed in a flood, but he believed that he spoke to Jones once

[2] Jenkins also complained about trial counsel's failure to subpoena Jones. Jones had indicated in her postconviction statement that she *had* received a subpoena for trial, though the postconviction motion indicates that the subpoena came from the State. The State released her and sent her home when it determined she was not needed. Jenkins contends that trial counsel should not have relied on the State's subpoena. However, by all accounts, Jones was willing to testify without the compulsion of a subpoena. Thus, we are not persuaded that failing to issue a subpoena to a willing witness, absent more, constitutes deficient performance in this case.

face-to-face and once over the phone. Jones herself estimated that she had spoken with counsel four times. To the extent that trial counsel did investigate Jones and determined that she would not be helpful to the defense strategy, we would be hard-pressed to find deficient performance. Thus, Jenkins' complaint seems to be more that trial counsel was ineffective for not putting Jones on the stand. However, the circuit court concluded there was no prejudice from that decision.

¶15 The circuit court, though it had difficulty evaluating trial counsel's performance, nevertheless concluded that there was no prejudice from failing to call Jones because "given all her contradictions … this court cannot say that there's a reasonable probability that but for not calling her the result would have been different." We agree.[3]

¶16 The circuit court commented that Jones's description of the shooter got "better and better as time [went] on." Jones first told police that she had not seen the shooter because it was dark out and he was wearing a hoodie. She then told police that the defendant had a medium complexion with a clean-shaven baby face. She also told police that he had a light complexion, but that she had been more focused on the laser sight displayed on her shirt than on the shooter. Jones then specified that the shooter was clean shaven, and specifically identified that he had no acne. Jones also claimed that she had been shown six photos from an array all at once, two of them being of Jenkins, whom she identified and expressly told police was not the shooter; this information was contrary to police reports, which

[3] Jenkins complains that, because the circuit court commented on the inconsistencies in Jones's testimony as challenging her credibility, the circuit court made an improper credibility finding that should be left to a jury. The quoted portion of the circuit court's decision, regarding the probability of a different result, satisfies us that the circuit court applied the proper legal standard.

described a different procedure for showing the array and which indicated that Jones had not identified anyone in the array.

¶17 Jones was also inconsistent in describing her involvement with the marijuana sale that preceded the shooting.[4] She omitted mention of the drugs in her first statement to police because she did not want to get in trouble. She did not mention drugs in her postconviction statement. In her second statement to police, she said she had obtained the drugs from inside a house to sell to Weaver and Kimber. At the ***Machner*** hearing, Jones said her cousin sold the drugs.

¶18 Jones also did not aid the alibi defense. Jenkins believes she did because Jones puts him on a nearby porch shortly after the shooting. Trial counsel recalled thinking that McFadden was the better witness and was reasonably strong by himself. Indeed, Jones did not see Jenkins *during* the shooting but, rather, three to five minutes after the fact. Jones testified that she fled the scene upon hearing gunshots and only saw Jenkins after she returned. This does not corroborate Jenkins' alibi that he was inside the house at the time of the shooting. *See* ***State v. Harp***, 2005 WI App 250, ¶16, 288 Wis. 2d 441, 707 N.W.2d 304 ("'[A]n alibi is a defense that at the time of the crime the defendant was so distant from the scene that his participation in the crime was impossible.… [A] purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.'") (citations and one set of quotation marks omitted).

[4] In light of Jones's inconsistencies, particularly with regard to the drug transaction and her admitted attempt to avoid liability therefor, it would also have been a reasonable strategy for counsel not to call her. *See* ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838 (In determining whether counsel's performance was objectively reasonable, we "may rely on reasoning which trial counsel overlooked or even disavowed.").

¶19 Based on the foregoing, we agree that Jones's testimony was not reasonably probable to change the results of the trial, and our confidence in the outcome is not undermined. *See* ***Strickland***, 466 U.S. at 694. Accordingly, trial counsel was not ineffective for failing to call Jones to the stand.

C. Christopher Blunt/Corey Moore

¶20 Jenkins believed that trial counsel should have subpoenaed Blunt and Moore after Blunt allegedly confessed to the shooting. The circuit court ruled that there was no ineffective assistance because Blunt would simply have denied his involvement and Moore's testimony would be inadmissible hearsay.

¶21 On appeal, Jenkins attempts to show how Moore's testimony could be admissible under hearsay exceptions, despite the circuit court's explanation of why hearsay exceptions were inapplicable. Irrespective of the hearsay issue, though, we think another of the circuit court's rulings is controlling: the circuit court noted that Moore's attorney had made him unavailable. Specifically, the circuit court explained that Moore's attorney "wouldn't have him interviewed" and "didn't want him to be available" so "to say that [counsel] then was supposed to subpoena him to try to get out of him a hearsay statement … I don't think it's deficient[.]" Thus, the circuit court found, and we agree, that trial counsel was not ineffective for not calling Moore.

¶22 As to Blunt, the parties stipulated that he would have testified consistent with the statement given to Jenkins' investigator—specifically, that he would deny knowing Jenkins or anything about the shooting. On that ground, the circuit court determined that there was no prejudice from a failure to call Blunt. We agree. We also agree that to the extent that trying to pin the shooting on Blunt was inconsistent with the alibi defense and theory that Kimber's identification was

faulty, failing to call Blunt was not deficient. Accordingly, there is no ineffective assistance of trial counsel from counsel's failure to subpoena Blunt or Moore.

II. New Trial in the Interests of Justice

¶23 Because of the perceived ineffective assistance of trial counsel in failing to summon Jones, Blunt, and Moore to testify, Jenkins sought a new trial in the interests of justice. "We may exercise our power of discretionary reversal where it appears from the record that the real controversy has not been fully tried, or if it is probable that justice has for any reason miscarried." ***State v. Davis***, 2011 WI App 147, ¶16, 337 Wis. 2d 688, 808 N.W.2d 130. The real controversy is not fully tried if the jury was not given an opportunity to hear and examine evidence bearing on a significant issue in the case. ***Id.***

¶24 However, discretionary reversal "based on a determination that the jury was denied the opportunity to hear important evidence" refers to a legal, evidentiary error by the circuit court. *See* ***State v. Burns***, 2011 WI 22, ¶45, 332 Wis. 2d 730, 798 N.W.2d 166. The error in this case is not premised on an incorrect evidentiary ruling but, rather, on trial counsel's purported ineffectiveness. Thus, there is no basis for a new trial in the interest of justice based on the fact that the jury did not hear testimony from Jones, Blunt or Moore. The circuit court properly denied the motion.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).